No. 89-260

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE STATE OF IDAHO,

Petitioner,

v.

LAURA LEE WRIGHT,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Idaho

BRIEF OF RESPONDENT LAURA LEE WRIGHT

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QUESTION PRESENTED

Whether the Supreme Court of the State of Idaho ruled correctly that out of court statements of a child, who is incompetent to testify, may not be admitted against a defendant without violating that defendant's confrontation rights when:

A. The three-year-old witness was found to be unable to receive and communicate just impressions;

B. The child's statements were found not to fall within any traditional hearsay exception;

C. The statements were elicited by an interviewer with preconceptions who asked blatantly leading questions; and

D. The interview was not recorded in any fashion and some of the interviewer's notes, including the child's drawing made during the interview, were lost or destroyed before trial.

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STATEMENT OF THE CASE

Respondent Laura Wright and co-defendant Bobby Giles were each found guilty of two counts of lewd conduct with a minor and sentenced to 20 years in prison. In her state appeal Ms. Wright challenged her conviction for abusing the younger girl, Kathy. The Supreme Court of the State of Idaho concluded that admission of extra-judicial statements obtained from the younger girl during an investigatory interview violated Ms. Wright's federal confrontation rights and reversed the conviction on that count. The admissibility of those statements is the issue before the Court.

Ms. Wright is the natural mother of the two alleged victims.[1] Co-defendant Bobby Giles is the father of the younger girl, Kathy. Ms. Wright's ex-husband, Louis Wright, is the father of the older girl, Jeannie. The girls were two and a half and five and a half years old, respectively, at the time the offenses allegedly occurred. The girls were three and six by the time of trial.[2]

The sexual abuse allegations were first raised by Ms. Wright's ex-husband, Louis, and Louis' live-in girlfriend, Cynthia Goodman. There had been long-standing animosity between Louis and the two defendants before any

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[1] Ms. Wright's parental rights to the girls were terminated in a civil proceeding. Because the decision before this Court for review was based upon confrontation clause violations, rather than upon due process or hearsay rule violations, the ruling in the case below would ordinarily have no effect on the terminations. However, because the only evidence of abuse admitted in the civil case was the judgment of conviction being reviewed by the Court, that termination may be retried.

[2] Tr. Vol. II, p. 456-60.

charges were made.[3] Louis, a convicted felon,[4] had threatened that if he could not have Jeannie, he would see that Laura did not have her either. He threatened to see that the State got custody of her.[5]

Louis had persuaded Laura Wright to sign an agreement giving Louis custody of Jeannie for six months of every year. Laura testified, "[H]e coaxed me into signing a paper stating if I didn't sign the six-month custody deal that he'd skip the State with Jeannie May [Wright]."[6] Doris Gornier, who worked with both Mr. Wright and Mr. Giles, testified she heard several fights between Louis Wright and Robert Giles at work. These fights were about the older girl, Jeannie. Louis would threaten "[t]hat Bobby was not going to raise Jeannie May, and that he would get even with them one way or another."[7]

In early October, 1986, Louis and Cyndi came to get Jeannie for a six month visit. Louis and Laura fought. Laura did not want to let Louis take Jeannie "[b]ecause he did not come by for nine months to see the child, and I figured he wasn't a father at all."[8] Louis took Jeannie purportedly for a quick trip to the 7-Eleven and back but he and Cyndi sped away with Jeannie screaming.[9] Ms. Wright has never been reunited with Jeannie.

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[3] Mr. Wright was angry at both Ms. Wright and Bobby Giles. Laura left Louis in 1982 to become involved with Mr. Giles (Tr. Vol. III, p. 525, Ls. 8-9; p. 660, Ls. 14-24).

[4] Tr. Vol. III, p. 489, Ls. 16-18.

[5] Tr. Vol. III, p. 526, Ls. 14-18.

[6] Tr. Vol. III, p. 526, Ls. 14-18.

[7] Tr. Vol. III, p. 652, Ls. 8-20.

[8] Tr. Vol. III, p. 528, Ls. 2-5.

[9] Tr. Vol. III, p. 529, L. 24 - p. 530, L. 18.

One or two days later, Laura met with an attorney to file an action for divorce, seeking child support and full custody of Jeannie. According to the attorney this was October 8th of 1986.[10] Ms. Wright and Mr. Giles agreed that an independent investigator should be appointed by the divorce judge to talk to Jeannie and to investigate the households of both Ms. Wright and Louis Wright to determine the best interests of the child. A divorce complaint and a motion for appointment of an investigator were filed approximately one week later.[11]

Mr. Wright was served with the complaint and the request for an independent investigator but he neither answered nor appeared at the hearing set October 29th, 1986.[12]

On November 9th, 1986, before Ms. Wright could obtain a divorce by default, Mr. Wright and his girlfriend, Cyndi Goodman, made the accusation of sexual abuse to the authorities.[13] This accusation was made more than one month after Louis took Jeannie, and three weeks after he was served with pleadings requesting home studies and custody.

Mr. Wright and Ms. Goodman testified that Jeannie first disclosed sexual abuse on November 8th, 1986. According to Ms. Goodman, Jeannie told her that Bobby [Robert Giles] "would get on top of her and—how did she put it? He would move and move and move and it would hurt . . . . [S]he said that Bobby would put his prick in her pussy, as she put it . . . . [S]he said that her mom would

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[10] Tr. Vol. III, p. 533, Ls. 3-20 p. 612, Ls. 7-15; p. 613, Ls. 4-7.

[11] Tr. Vol. III, pp. 615-617.

[12] Tr. Vol. III, p. 618, Ls. 1-25.

[13] Tr. Vol. II, pp. 333-335; Vol. III, p. 619, Ls. 1-14.

hold her legs apart, you know, and she got down on the floor of the bathroom and she laid down on her back and she pulled her legs apart and showed me how." Ms. Goodman continued, "[S]he said that her mom would cover her mouth like this (indicating) . . . ." She testified Jeannie said her mother would help her wipe herself off.[14]

According to Cyndi's testimony, Jeannie's alleged disclosure included an accusation that Ray Carleton had done the same things to Jeannie and that Jeannie had seen Bobby and Laura doing the same thing to Jeannie's sister, Kathy.[15]

After receiving these accusations and interviewing Jeannie Wright, police and welfare officials took Kathy Wright into their custody for protection and investigation. As part of that investigation, the police and welfare officials took Kathy to a pediatrician, Dr. Jambura, for physical examination and an interview. The dispute before the Court concerns the admissibility of statements the pediatrician elicited from Kathy.

The trial court allowed the pediatrician to testify concerning hearsay statements made to him by alleged victim Kathy Wright. This evidence was admitted over the Defendants' objection. Kathy Wright, who was three years old at the time of the trial and only two years old at the time of the out-of-court statements to Dr. Jambura, did not testify before the jury. The trial judge conducted a *voir dire* examination of Kathy Wright in the presence of Defendants and their attorney but not in the presence of the jury. The defense lawyer and the prosecutor agreed Kathy was not competent to testify.[16]

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[14] Tr. Vol. III, pp. 456-60.

[15] Tr. Vol. III, p. 458, Ls. 9-11; p. 460, Ls. 14-20.

[16] J.A. 39.

Dr. Jambura is the pediatrician who conducted a physical examination of Kathy Wright and asked her whether sexual abuse occurred between Kathy and the two co-defendants. Dr. Jambura testified that in the course of his conversation with Kathy, he asked her four "pertinent" questions: 1) "Do you play with daddy?" 2) "Does daddy play with you?" 3) "Does daddy touch you with his pee-pee?" 4) "Do you touch his pee-pee?"[17] According to Jambura, Kathy Wright answered the first two questions by saying "Yes, we play a lot" and expanding on that. She "admitted" that "daddy" did touch her with his "pee-pee," but had no response about whether she had touched her father's "pee-pee."[18] The doctor claimed Kathy then volunteered that her daddy "does do this with me, but he does it a lot more with my sister than me."[19] No video or audio record was made of this interview even though Kathy was in the protective custody of the government, believed to be a victim of sex abuse and the sole purpose of the examination and interview was to gather evidence of the suspected abuse. Jambura lost or destroyed a picture drawn during the interview.[20]

Jeannie Wright did testify at trial.[21] In addition to Jeannie's statements related by Ms. Goodman, *supra*, prior consistent hearsay statements of Jeannie were admitted through counselor Carol Sorini,[22] Dectective

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[17] J.A. 122.

[18] J.A. 122.

[19] J.A. 122, Tr. Vol. II, p. 389, Ls. 13-14.

[20] J.A. 124.

[21] J.A. 40-90.

[22] Tr. Vol II, pp. 272-289.

Larry Armstrong,[23] psychologist Michael Eisenbeiss,[24] Officer Tom Holst[25] and Dr. Mark Johnson.[26] These prior consistent statements were not objected to by trial counsel.

Both Defendants took the stand and denied the charges.[27] Ray Carleton denied Jeannie's allegations.[28] Although Jeannie's allegations against Mr. Carleton were identical to her allegations against Laura Wright and Bobby Giles (Laura held Jeannie down while Mr. Carleton had intercourse with her[29]) and were made at the same time as the alleged disclosure against the two co-defendants, he was never charged.[30]

Ms. Wright appealed the conviction for abusing the younger girl to the Supreme Court of Idaho.[31] The state court reversed, finding that the interview of Kathy by Dr. Jambura was not conducted in such a manner as to guarantee the accuracy of the child's statements elicited. That court concluded that the state had not shown sufficient particularized guarantees of trustworthiness to justify dispensing with confrontation and cross-examination and admission of Kathy's alleged statements therefore violated Ms. Wright's federal confrontation rights.

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[23] Tr. Vol. II, p. 323, Ls. 17-24.

[24] Tr. Vol. II, pp. 418-419.

[25] Tr. Vol. III, pp. 517-518.

[26] Tr. Vol. III, pp. 512-513.

[27] Tr. Vol. III, p. 539; Tr. Vol. III, pp. 669-671.

[28] Tr. Vol. III, p. 638, L. 16 to p. 641, L. 6.

[29] Tr. Vol. III, p. 642, Ls. 12-20.

[30] Tr. Vol. III, p. 626, Ls. 18-20.

[31] Ms. Wright's complaints about the conviction on the other count must be raised in an action for post-conviction relief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Prosecutions of charges of sexual abuse of children present the courts with some of the most challenging legal issues in the criminal law. These prosecutions present unique issues because the child is often the only witness and medical corroboration is often non-existent or equivocal. On one hand, we will not tolerate any rule of evidence which has the practical effect of decriminalizing sex abuse of very young children by making prosecutions of all such crimes impossible.

On the other hand, our society has a long, proud tradition of high integrity and accuracy in fact finding in our criminal justice system. We resolve all factual doubts in favor of the accused. Our society does not tolerate the risk of conviction of innocent people. However, in child sex abuse cases, there is a very real danger that the voices of the innocent may not be heard above the din of expressions of outrage and disgust; that innocent individuals will be buried under our desire to accommodate prosecutors' special needs in these cases.

Many child abuse experts have commented that a large percentage of allegations of child sexual abuse are false. A precise tally of false accusations is impossible without the divine omniscience required to know for certain which allegations are true and which are false. It does seem certain, however, that the portion of these allegations which are false is huge and is growing.[32]

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[32] *See, e.g.*, W. Slicker, *Child Sex Abuse: The Innocent Accused*, 91 Case & Comment 12, Nov./Dec. 1986. This article cites several studies showing 40% to 80% of sex abuse allegations are false.

One source of false reports is the pressure upon professionals to report any suspicions whatever.[33] Another source of false reports is custody and divorce litigation.

> There is something about the matrimonial action that brings out the very worst in people . . . . Years ago, charges of adultery filled the pages of divorce complaints since proof of such charges could influence a divorce court to give the "innocent" spouse the advantage. When adultery became relatively commonplace, it was the charge of cheating on one's income tax that was used to ruffle the feathers of the other side. After that became old hat, drug abuse was the charge of choice. And then, in the early '80s, when cocaine usage became something seen in so many papers that it too sank to a level where it failed to give anyone a jolt, charges of child sexual abuse started to be made.[34]

Whatever the source of the referral, there is a danger that the children's suggestible minds will be manipulated, intentionally as in a vicious divorce, or innocently by some well-meaning child protection worker.

> When it comes to a child's statements about sexual victimization, there are not two possibilities—lying or telling the truth—but three. A child, particularly a very young one, may say what he or she believes is true, even though it is not the truth.

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[33] Besharov, *Doing Something About Child Abuse: The Need to Narrow the Grounds for State Intervention*, 8 Harv. J.L. & Pub.Pol. (The author is a former New York City prosecutor and was director of the National Center on Child Abuse and Neglect.) Between 1976 and 1978, the percentage of unfounded reports of child abuse increased from thirty-five to more than sixty-five percent.

[34] Dobrish, *Representing the Father Who Is Accused of Child Sexual Abuse*, 23 Fam.L.Q. v-viii 465-75, Fall, 1989.

> At first blush, this seems a rather unlikely possibility, to say the least. A child believes in sexual abuse which has not taken place. I would certainly be skeptical of such an idea if I hadn't had a chance to see how children are manipulated by adult interviewers —sometimes by a police officer or protective service worker, sometimes by a mental health professional— who have been trained to believe that those who really care and are sufficiently skilled at their work will help the child talk about sexual abuse.
>
> . . . Everything from nightmares to temper tantrums is being listed by the experts as signs that should alert parents to the possibility of sexual abuse.
>
> Coleman, *Has a child been molested?* 7 Cal.Law. 15 (1986).

The Idaho Supreme Court has forged an elegant solution to the problem of how to balance the various interests involved in child sex abuse litigation. The state court found that the admission of the statements of young Kathy Wright did not violate the state hearsay rule but did violate Ms. Wright's confrontation rights.[35] This distinction means similarly obtained statements will be admissible in child custody litigation and in other civil proceedings for the protection of children, which are tried without juries and the overriding purpose of which is the protection of children. These statements cannot be admitted in criminal prosecutions in deference to our country's intolerance of risk of conviction of the innocent and our explicit guarantee of an accused's right to confront his accusers.

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[35] The other holding below, that Idaho's hearsay rule is satisfied by a lesser showing of reliability than required by the confrontation clause, is one of state law. Idaho has a "catch-all" hearsay exception identical to F.R.E. 803(24).

The court below recognized that children's memories are subject to suggestion and that it is possible to create a memory, as real to the child as any other, of an event that did not occur.[36] The particular statements before the Court were found to be insufficiently reliable because they were elicited from a very young child by blatantly leading questions asked by an interrogator who had preconceptions about whether abuse had occurred. This improper questioning was particularly dangerous with *this* child because of the inability to communicate she demonstrated in the hearing on competency. She confused such easy questions as What is your name? and How old are you? The leading questions were more dangerous because the interviewer had information and preconceptions about the abuse allegations, thus he had suggestions to impart and a motive to do so. No videotape was made of the questioning and statements so the state was unable to prove the statements elicited by these dangerous techniques were reliable in spite of the techniques used.

Petitioner has misrepresented the holding of the Idaho Supreme Court. The court below did not hold that any use of leading questions prevents use of the statements thereby obtained. The court did not say that statements cannot be admitted unless they were elicited on videotape, nor did the court say that the questioner can possess no knowledge of the allegations. The court below found the statements to be untrustworthy because of the combination of these factors and the record made of this particular child's ability to communicate.

Respondent will discuss each of the factors mentioned by the Idaho Supreme Court and will demonstrate that each factor was properly considered. Ms. Wright will then

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[36] Appendix to the Petition, pp. 36-42; 775 P.2d at 1226-1230.

discuss the interrelationship of these factors and show that the lower court was correct in concluding the prosecution had failed to establish sufficient reliability of the statements to justify their admission without confrontation and cross-examination.

ARGUMENT

EFFECT OF THE CHILD'S INABILITY TO COMMUNICATE AS A WITNESS

Following *voir dire* conducted out of the presence of the jury, the trial court found Kathy Wright, the child declarant, unable to communicate and, therefore, incompetent to testify as a witness under Idaho's rules of competency.[37] That determination was not challenged by either party.[38] Children are not disqualified merely by their youth from being witnesses in Idaho. This child declarant was ruled incompetent because she demonstrated an inability to respond to simple questions.

> Q. Hi, Kathy. Can you tell me your name please?
>
> A. (No audible response.)
>
> Q. Are you kind of scared? Can you tell me your name, and tell me how old you are?
>
> A. Kathy Wright.
>
> Q. Who do you have with you there that you're holding—can you tell me the names of the toys that you have that you're holding?

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[37] Rule 601 of the Idaho Rules of Evidence provides: "Every person is competent as a witness except: (a) Incompetency determined by the court. Persons whom the court finds to be incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly."

[38] J.A. 38-39.

A. Kathy Wright.

Q. That's your name? Okay. How old are you, Kathy? How old are you?

A. My—Kathy Wright.

Q. Can you tell me the names of your father and your mother?

A. (No audible response.)

Q. Can you tell me what they are?

A. What?

Q. Do you know where you are right now?

A. No.

***

Q. Can you tell me how old you are, Kathy?

A. Kathy Wright.

***

Q. Do you know how many years you've been alive?

A. Six.

Q. Six years. How old do you think you are?

A. Six years. [She was three years old.]

***

Q. . . . Do you know what that is over there (indicating)?

A. Star.

Q. Is that a star? That kind of looks like a big scarf doesn't it. . .

(J.A. 32-37)

In ruling the child to be incompetent to testify, the trial judge necessarily found her to be incapable of receiving just impressions of fact or of relating them truthfully. Rule 601(a) Idaho Rules of Evidence. The Idaho Supreme Court was surely entitled to consider this declarant's inability to receive just impressions of facts, or to relate them truthfully, as a factor bearing upon the reliability of the declarations at issue. Kathy's assertions were too unreliable for her to testify and be subjected to cross-examination in the presence of the accused and the jury. Her statements were no *more* reliable because they were related through the paraphrase of the pediatrician and Kathy was not observed by the jury or subjected to cross-examination.

Courts which have considered the effect of incompetency of a declarant on the admissibility of the declarations have generally excluded the statements. The theory supporting exclusion is that if a declarant so lacks the ability to communicate that he or she cannot testify, that declarant's statements are no more reliable because they are given outside of court and then related through another person.

> When a trial justice has ruled a witness incompetent to testify because the justice is not convinced the witness is capable of relating a capacity to observe, to recollect, to communicate, or to appreciate truthfulness, the justice has already made the determination that the witnesses' assertions are unreliable. Though there may be instances in which a witness is competent at the time he or she makes an assertion and later, at the time of trial, due to the onset of senility or mental illness, is incompetent, such does not hold true with infants. If an infant is ruled incompetent at the time of trial because she is only four years old, assertions made by that infant a year earlier cannot be considered inherently more reliable.

> Logic dictates that, if anything, they may be less reliable.

State v. *Paster*, 5244 A.2d 587, 590 (R.I. 1987).

The court in *Paster* ruled that the child's declarations to a social worker, a doctor, and a counselor all were inadmissible, no matter what hearsay exception was relied upon. That court reasoned that statements made by an incompetent witness do not become more reliable when repeated by an adult in court.

The court in *Paster* left open the possibility that declarations of very young persons may be admissible if the circumstances surrounding those statements contain guarantees of reliability such as spontaneity, excitement and proximity in time to the acts complained of. *Accord*, *Ketcham* v. *State*, 162 N.E.2d 347 at 251 (Ind. 1959):

> If the small child could tell the story to her mother, she could have told it on the witness stand to the jury, where it could be subjected to the usual tests of credibility. It is no answer to say she was too young to be a witness. If such be true, then the credibility of such testimony was not enhanced by having it presented second-handed to the jury by another person.
>
> This is a long-standing rule, according to Wigmore:
>
> The hearsay rule is merely an additional test or safeguard to be applied to testimonial evidence otherwise admissible. The admission of hearsay statements, by way of exception to the rule, therefore presupposes that the assertor possessed the qualifications of a witness.

5 J. Wigmore, Evidence 1424 at 255 (Chadbourn Rev. 1974). *See also*, *State* v. *Ryan*, 691 P.2d 197, 203 (Wash. 1984): "If the declarant was not competent at the time of making the statements, the statements may not be introduced through hearsay repetition."

Of those authorities holding the declarations of very young children admissible, the overwhelming majority have done so only when the spontaneity of the statement appears to guarantee its reliability.[39]

Respondent submits the Idaho Supreme Court was entirely correct to consider the incompetence of this declarant, especially the *voir dire* record demonstrating that incompetence, as a factor suggesting unreliability of the statements at issue. At the time of trial this child was unable to give such simple answers as where she was, her name or her age. This was six months *after* the interview by the testifying pediatrician.

It is unrealistic to assume that Ms. Wright could have elicited much useful specific information from the child through cross-examination, since the child responded so poorly to questioning by the trial judge. However, Ms. Wright and the jury would have been helped a great deal in another way if the child had been questioned before the jury. Ms. Wright could have demonstrated for the jury the child's apparent confusion and lack of communication skills. It would be very useful to jurors who are trying to determine what weight to give an out-of-court declaration for those jurors to see that the declarant confuses questions about her name with questions about her age.

Here the evidence lost by the jury and the defendant through denial of cross-examination is not so much what

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[39] *See*, 4 J. Weinstein & M. Berger, Weinstein's Evidence § 804 (a) (01) at 804-40 (1981); *State* v. *Ryan*, 691 P.2d 197, 203-04 (Wash. 1984) (1986); *Huff* v. *White Motor Corp.*, 609 F.2d 286 (7th Cir. 1979) Admission of evidence pursuant to the "catch-all" provisions of the Federal Rules of Evidence 803(24) and 804(b)(5) is conditioned on the declarant's competency at the time he made the statements. "If that mental competence was lacking, so are the guarantees of trustworthiness." 609 F.2d at 284. 38 Baylor Law Rev. 859-75.

the child would have said under cross-examination as how she would have said it. One of the values protected by the confrontation clause is the increased reliability of fact finding when the accuser stands "face to face with the jury so that they may look at him and judge, by his demeanor upon the stand and the manner in which he gives his testimony, whether he is worthy of belief." *Mattox* v. *United States*, 156 U.S. 237, 242-43 (1895).

LEADING QUESTIONS DECREASE RELIABILITY OF RESULTING STATEMENTS

The state court cited the use of "blatantly leading" questions as a factor which militated against a finding that the child's statements were reliable. This factor is related to the preconceptions of the interrogator. The danger of leading questions posed by an interviewer with preconceptions of what the child should be disclosing is that the questioning may create a memory of an event which never occurred.

Research shows adults, as well as children, are susceptible to suggestion. *E.g.*, Loftus, Miller & Burns, *Semantic Integration of Verbal Information into a Visual Memory*, 4 J. Experimental Psychology: Human Learning and Memory 19 (1978). One source of suggestion is the form of the question, with such subtle differences as the choice of article ("Did you see the . . ." as opposed to "Did you see a . . .") creating a significant difference in the recall of a nonexistent object. Dale, Loftus & Rathbun, *The Influence of the Form of the Question on the Eyewitness Testimony of Preschool Children*, 7 J. Psycholinguistic Research 629 (1978). Some studies show suggestibility decreasing with age. *E.g.*, Cohen & Harnick, *The Susceptibility of Child Witnesses to Suggestion: An Empirical Study*, 4 L. & Human Behavior 201 (1980).

Children aged nine and twelve and adults were shown a film depicting crimes and then asked questions. Half the questions were misleading. When the groups were retested a week later all groups showed some incorporation of the misleading information from the questions into their memories, however, accuracy increased with the age of the subject. Some studies support the hypothesis that the increase in suggestibility of younger children may be partially accounted for by different susceptibility to "demand characteristics" in the situation, in other words, an increased motivation to provide the responses shown to be appropriate by comments, smiles, and other nonverbal behavior. King & Yuille, *Suggestibility and the Child Witness*, in Children's Eyewitness Memory, 24 (S. Seci, M. Toglia & D. Ross, eds. 1987). Psychologist Dr. Steve Thurber testified without contradiction at Ms. Wright's trial that it is possible to shape the responses of very young children into sexually bizarre descriptions. These are children with no history of abuse. This shaping has been accomplished merely with nods of the head and saying "um-hum" at appropriate times. (J.A. 138-39). See also, W. McIver, *The Case for a Therapeutic Interview in Situations of Alleged Sexual Molestation*, The Champion, Jan./Feb. 1986:

> In this setting (which is "high pressure" to the child, especially a young one) a strongly biased interviewer can shape a child's responses by a method called "successive approximation." Simply put, this means reinforcing or rewarding the child (through smiles, hugs, or statements like "good girl . . . don't you feel better now . . . that's the way") for statements leading up to and finally including those the interviewer wants to hear.

The amicus brief filed by the American Professional Society on the Abuse of Children, *et al* (the child advo-

cates) demonstrates there is need for more research on memory and child development. (Brief of Child Advocate Amici, pp. 16-25). These *amici* concede there is some danger that suggestion can contaminate memories, particularly the memories of very young children. (Id. p. 9). These amici are concerned that occasional use of a leading question might prevent admissibility of a reliable statement.

Neither the Idaho Supreme Court nor Ms. Wright contends that sparing, judicious use of leading questions should prevent use of statements thereby obtained, particularly where the interrogation is recorded for later analysis by independent experts and viewing by a jury. The court below cited the use of the blatantly leading questions employed by the pediatrician in this case as only one of several factors leading to the conclusion the statements were not shown to be reliable. The concession of these *amici*, that leading questions *can* be dangerous to the pursuit of truth, supports the conclusion that the court below was correct in considering this factor. Furthermore, on the ultimate issue of whether abuse occurred, not one of the authorities cited by these *amici* condones any use of such blatantly suggestive, leading questions as those asked in this case.

Courts which have considered the effect of questioning upon admissibility of statements as spontaneous utterances hold that questioning does not necessarily negate the spontaneity which carries assurances of reliability. *E.g.*, "What happened?"—*People* v. *McNichols*, 487 N.E.2d 1252, 1258 (Ill. App. 1986); *People* v. *Cherry*, 411 N.E.2d 61 at 67 (Ill. App. 1980): "It is well established that asking the declarant 'what happened' is insufficient to destroy the spontaneity of the response." (4 year old).

Questioning is a factor which can negate the spontaneity which justifies confidence in the trustworthiness of the statement. "The key inquiry . . . is whether the statement would have been made if the questions had not been asked." *People* v. *Watts*, 487 N.E.2d 1077, 1086 (Ill. App. 1985). *People* v. *Pullins*, 378 N.W.2d 502 (Mich. App. 1985); *State* v. *Fader*, 385 N.W.2d 42, 45 (Minn. 1984); *State* v. *Roy*, 436 A.2d at 1092 (Vt. 1986); *Lyles* v. *State*, 412 So.2d 458 at 460; *State* v. *Brown*, 341 N.W.2d 10, 13 (Iowa 1983) (The questions were calculated to elicit information that would otherwise have been withheld).

THE FACTORS DISCUSSED BY THE STATE COURT—PRECONCEPTIONS OF THE INTERROGATOR, USE OF LEADING QUESTIONS, THE CHILD'S INABILITY TO COMMUNICATE, AND ABSENCE OF VIDEOTAPE RECORD —ARE INTERRELATED

The lower court discussed use of leading questions, preconceptions of the interrogator, absence of a videotape record and the child's inability to meet the state's witness competency requirement as factors weighing against a finding of reliability of the child's statements. The Petitioner mistakenly treats these factors as independent. The opinion below cannot fairly be read to stand for the proposition that absence of a videotape, by itself, or any use of leading questions, without more, would necessarily compel a finding of inadmissibility. The Idaho court did not hold, as suggested by the Idaho Attorney General, that any preconception of the interrogator by itself invalidates the use of a child's statement. The lower court held merely that the use of the blatantly leading questions asked by this interrogator, who had detailed preconceptions, in questioning this particular two and a half year old child, who demonstrated a striking inability to respond to simple questions asked by the trial judge in the compe-

tency hearing, are factors which, when considered with all the other circumstances present in this case, do not guarantee the reliability sufficient to dispense with confrontation under this Court's decisions.

Petitioner criticizes the court below for failing to consider all the circumstances relating to reliability of statements. Petitioner has analyzed in isolation each of the factors discussed by the court below. Petitioner correctly concludes that each of these factors can be present and yet other circumstances can justify a high degree of confidence in the reliability of a statement. Petitioner is *not* justified in criticizing the reasoning of the court below based upon analysis of each of the factors in isolation. Petitioner, not the Idaho Supreme Court, has failed to consider the totality of the circumstances. The combination of *all* these factors led the state court to conclude the prosecution had failed to establish the reliability of Kathy Wright's statements.

No one disputes that leading questions can taint the memory of children under some circumstances. The danger of suggestion from leading questions increases with the strength of preconceptions held by the questioner. A questioner who has no information or beliefs concerning a child is unlikely to impart suggestions to that child. A questioner who has strong and detailed beliefs is more likely to suggest and reward specific details from the child, innocently or otherwise. These two factors, leading questions and preconceptions of the interviewer, are interrelated.

Similar interrelationships exist among all the factors discussed in the Idaho court opinion. For example, the fact that this particular child was unable to answer direct and simple questions such as Who are your parents? and

How old are you? casts grave doubts about the reliability of the child's responses to such blatantly leading questions as "Does Daddy touch you with his pee-pee?"

VIDEOTAPING INTERVIEWS OF CHILDREN BELIEVED TO BE VICTIMS SATISFIES MANY OF THE GOALS OF THE CONFRONTATION CLAUSE

THE SIGNIFICANCE OF VIDEOTAPING

The commentators are in almost universal agreement that investigatory interrogations of children suspected to be victims of abuse should be videotaped.[40] As Dr. Thurber testified at the trial:

> A. One consistent recommendation in the sexual abuse area is that on the initial interview by a professional, that the interview session itself be videotaped. Thus other professionals independently can evaluate the quality of the interview techniques. That's the only way.
>
> Q. Is an audio tape valuable?
>
> A. In lieu of, or as a substitute for the video tape?

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[40] R. Underwager & H. Wakefield, *Interviewing the Alleged Victim in Cases of Sex Abuse: The Role of the Psychologist*, The Champion, Jan./Feb 1987 at 19: "*Videotape or audiotape all interviews* from the beginning. This provides for fully documented interviews and an accurate account of who said what can be transcribed. Videotape also permits examination of at least some of the nonverbal cues that may be present. In cases we have examined, often only the later interviews are videotaped. There is therefore no documentation of what was done in the first interviews. The lack of documentation leaves room for speculation about possible biasing or prejudicial behaviors." (Emphasis in original.) D.C. Moss, *Do Kids Lie?*, A. B. A. J., 25 (Dec. 1988); W. Slicker, *Child Sex Abuse: The Innocent Accused*, 91 Case and Comment 12 at 14 (1986); L. Coleman, M.D., *Has a Child Been Molested?* The [Idaho State Bar] Advocate 9, 10 (March 1987) (reprinted from the July, 1987 issue of The California Lawyer).

Q. Of course that won't reflect the nonvocal—

A. Correct. That would be the problem with it. So video tape is always recommended. (J.A. 140).

VIDEOTAPE RECORDS PROVIDE THE GOVERNMENT AN EXCELLENT MEANS OF PROVING CIRCUMSTANTIAL GUARANTEES OF RELIABILITY

The government bears the burden of establishing the particularized guarantees of trustworthiness required by the Court's explanations of the confrontation right. The placement of the burden of proof is consistent with traditional hearsay law analysis. The proponent of hearsay bears the burden of establishing applicability of an exception. This placement of the burden in criminal cases involving unavailable witnesses is justified by analogy to analysis of other constitutional rights applicable to criminal prosecutions.[41] One way the use of videotape is significant to confrontation clause analysis is simply its use as a means of proof. Because videotaping results in preservation of all the circumstances bearing on reliability of an elicited statement, a videotape record is a compelling way for the prosecution to meet its burden of proving reliability.

VIDEOTAPING PRESERVES EVIDENCE OF THE DEMEANOR OF NON-TESTIFYING WITNESSES

One means by which the right of confrontation contributes to accurate fact finding is by forcing a declarant to testify and to answer sometimes distressing questions in the presence of the jurors "so that they may look at him

[41] *E.g.*, the government must prove the existence of facts excusing a failure to obtain a warrant, *Bumper* v. *North Carolina*, 391 U.S. 543 (1968) (consent to search); the government must prove the voluntariness of confessions, *Lego* v. *Twomey*, 404 U.S. 477, 489 (1972).

and judge, by his demeanor upon the stand and the manner in which he gives his testimony, whether he is worthy of belief." *Mattox* v. *United States*, 156 U.S. 237, 242-43 (1895).

Demeanor evidence is important in the instant case, not only to help the jury detect conscious falsification, but also to detect suggestion of memories to the child during the questioning, and to help the jurors decide for themselves whether the young child appeared to be recalling a memory or merely accommodating the doctor's preconceptions. The pediatrician testified that when he asked Kathy "Does daddy touch you with his pee-pee?" Kathy "did admit to that." (J.A. 122) Reasonable jurors viewing a videotape of the interview would have been free to conclude, contrary to the physician's interpretation, that this child who said she was six instead of three and who confused questions about her name with questions about her age, was not admitting anything. Jurors without the physician's preconceptions may have seen the child's behavior as accommodating the questioner—agreeing with his question without regard to content.

VIDEOTAPE RECORDS CAN BE AS EFFECTIVE A MEANS AS CROSS-EXAMINATION FOR AN INNOCENT ACCUSED TO PROTECT HIMSELF OR HERSELF AGAINST FALSE ACCUSATIONS

A videotape record provides the accused with a means of self-protection comparable to cross-examination. A recording of the interview will often be more effective than cross-examination of the child could ever be. Children differ from adults in their inability to distinguish memories of fantasized events from memories of actual experiences. Once an event has been suggested to the child by questionable interview techniques, the child's memory of the experience the interviewer has suggested

will be as real to the child as any other. *See, e.g.*, Cohen & Harnick, *The Susceptibility of Child Witnesses to Suggestion*, 4 Law & Human Behavior 210 (1980); Johnson & Foley, *Differentiating Fact from Fantasy: The Reliability of Children's Memory*, 40 J.Soc.Issues, 33, 34-36 (1984); Goodman & Hegelson, *Child Sexual Assault: Children's Memory and the Law*, 40 U. Miami Law Rev. 181 (1985).

Cross-examination is apt to offer an innocent accused impotent protection from a young witness who is conscientiously and accurately describing a memory created by suggestion of an event that never took place. Once confabulation occurs, the suggested memory is as real as any other. Cross-examination cannot show the child to be lying. She isn't. Cross-examination cannot disclose a motive or bias. The motive isn't hers. It belongs to the questioner who implanted the suggestion.

The confrontation clause has not served to prevent the admission of untruthful testimony. The clause guarantees a means (traditionally cross-examination) of protection against inaccurate testimony.

The confrontation clause has not been applied to prevent liars from testifying. Often, known liars, con artists and felons are the only witnesses available to the prosecution. The clause protects the accused by guaranteeing confrontation and cross-examination, not by preventing such witnesses from testifying. Nor does the clause guarantee the cross-examination will be successful. The Constitution does guarantee the cross-examination will be successful. The Constitution does guarantee a defendant an *opportunity* to test the evidence and to demonstrate for the jury why the evidence should not be used as a basis for conviction.

When confrontation is impossible, the clause has been interpreted to require exclusion of evidence, unless the

evidence is known to be reliable by some means other than confrontation and cross-examination.

The lower court's focus on the existence of a videotape record as a material factor in confrontation clause analysis is sound and is consistent with this Court's explanations of the purposes of the clause. A defendant can employ a complete videotape record of an interrogation of a young child to demonstrate subtle suggestion from improper technique. In this role, the videotape fulfills the function of protection ordinarily filled by cross-examination. The accused can demonstrate and argue to the jury the actual demeanor of the interviewer and the child. This preservation of demeanor evidence aids accurate fact-finding like confrontation ordinarily does.

The decision below advances the purposes of confrontation by encouraging videotaping of all interviews of possible victims of child sexual abuse, and by demanding a videotape record of the elicitation of questionable accusations by suspect means. Videotape records enable defendants to protect themselves against false accusations. Such records of well-conducted interviews facilitate prosecution of genuine offenders.

PRACTICALITY OF VIDEOTAPING

The child advocate amici express concern that affirmance of the Idaho Supreme Court will result in many reliable statements being ruled inadmissible.

> [C]hildren disclose sexual abuse in a wide variety of settings and at unpredictable times. Seldom is a tape recorder or video camera available at the critical moment. Yet, children's statements during interviews may bear all the hallmarks of trustworthiness. Given the myriad circumstances in which children are interviewed interposition of audio or video

> recording as a litmus test for reliability leads to the exclusion of reliable evidence. (Child Advocates' Brief at p. 7)

Respondent submits this criticism has absolutely nothing to do with the analysis of the court below. The statements at issue here were not elicited inadvertently. On the contrary, Kathy Wright was in custody for protection and for investigation of suspected abuse. The government had sole custody and control over her. Authorities took her to this doctor specifically to obtain evidence about whether or not abuse occurred. There is absolutely no reason why her interview could not easily have been recorded.

The more inadvertently a statement is obtained, the less danger there is that the statement is the product of suggestion or coercion, and the less need there is for a videotaped record. Someone with no idea a child has been abused is unlikely to influence a child to talk about abuse which has not occurred, at least by accident.

The more a statement is the result of intentional application of efforts to get a child to talk about abuse, the greater is the danger of using the statement as substantive evidence and the greater the need for the protections of videotaping, but the less excuse exists for failing to record elicitation of the statement.

These amici's objection that sex abuse disclosures sometimes develop slowly (Child Advocates' Brief at p. 7) is, in Ms. Wright's estimation, completely without merit. When the counseling sessions of a troubled child start involving discussions of abuse, the therapist can then start the video recorder. That a disclosure may occur over several sessions is completely irrelevant. On "extra long play" mode, six hours of sight and sound can be recorded

on a single standard VHS cassette tape which costs about three dollars. Respondent does not suggest therapists should be forced to record these sessions, only that the statements elicited during these sessions should not be admitted against an accused without confrontation and cross-examination if the therapist elects not to preserve evidence of the circumstances surrounding the statement.[42]

SUMMARY OF VIDEOTAPING

The court below did not suggest that videotaping is necessary to admissibility of a young child's statements. The Idaho Supreme Court mentioned the absence of a videotape record as only one of several circumstances which led the court to conclude Ms. Wright's confrontation rights had been violated. The opinion below suggests the prosecution can use a videotape to meet its burden of showing a child's extrajudicial statement is reliable *in spite of* dangerous use of leading questions, asked a very young and easily confused child.

EFFECT OF PETITIONER'S MISREPRESENTATION OF THE HOLDING BELOW

The Idaho Attorney General misrepresented the holding in *State* v. *Wright*, the case petitioned from. The Idaho Supreme Court discussed the use of leading questions, preconceptions of the interrogator, and incompetence of the child in ruling that the particular statements before

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[42] The child advocates' concern about confidentiality of videotapes is understandable. However, it is one thing to say those in possession should be careful with the dissemination of evidence; it is quite another to recommend that we forego protecting everyone involved by preserving the best evidence available just because someone might carelessly or irresponsibly misuse the evidence.

that court were insufficiently reliable to justify the conclusion that confrontation and cross-examination would be of no use to the accused and, therefore, could be dispensed with without offense to the Constitution. Ms. Wright suggests the Court should affirm. Each of the factors considered by the Idaho Supreme Court was properly considered and weighed. Alternatively, the Court should dismiss the Petition because the holding of the state court was misrepresented by the Petitioner. The Court granted review on an issue raised by the Idaho Attorney General which issue is not presented by a fair reading of the state court's opinion. Ms. Wright suggests it is inefficient use of the Court's resources to reweigh all the factors and reconsider the factual determinations made by the state court.

If the Court does decide to review the factual determinations made by the court below upon the entire record, Ms. Wright asks the Court to consider the factual matters addressed below.

THERE IS NO SUBSTANTIAL MEDICAL CORROBORATION OF THE STATEMENTS

Dr. Jambura testified he thought sexual abuse was "probable," (Tr. Vol. II, p. 396, Ls. 3-6) or as he put it in his report, "possible" (Tr. Vol II, p. 392, Ls. 4-7). He explicitly relied upon "historical evidence from her [Kathy's] sister." (Tr. Vol. II, p. 392, L. 3.). The doctor also relied on Kathy's responses to his very leading question, "Does daddy touch you with his pee-pee?" The fact that "daddy" was the alleged perpetrator added weight to his opinion. "[I]t's not so much a qualitative difference of sexual abuse versus no sexual abuse, but of a quantitative difference of how strongly I would—how strong my opinion would be in that regard." (Tr. Vol. II, p. 384, L. 10 to p. 385, L. 22).

Based solely on his physical examination findings, a swollen and inflamed fourchette, all Dr. Jambura can say about sexual abuse is that it is a "possibility." (Tr. Vol. II, p. 395, Ls. 19-24). In other words, he could not rule it out based on physical evidence. If he expressed more confidence that Kathy was sexually abused, based only on a swollen and inflamed fourchette seen with his unaided eyes, he would be contradicting some very weighty medical research. (*See, e.g.*, Emans, Woods, Flagg & Freeman, *Genital Findings in Sexually Abused, Symptomatic and Asymptomatic Girls*, 79 Pediatrics 778-785 (1987). Emans *et al* examined 305 girls using very sensitive methods which were rigorously controlled for uniform technique. They employed the magnification of a pediatric otoscope and colposcope. The girls belonged to three categories: those who were referred because of sexual abuse, those who had no reported problems (asymptomatic), and those who reported urinary or vaginal-area problems with no history of sexual abuse (symptomatic). Asymptomatic girls were easily distinguished from both sexually abused and symptomatic girls. However, in spite of sensitive and meticulous examinations, *there was no way to distinguish sexually abused girls from non-abused girls who had infections and other vaginal area problems, on the basis of a pelvic examination.*

Dr. Jambura's examination falls short of substantial corroboration. First, he never said he could corroborate sexual abuse based solely on his physical findings, and second, such corroboration based solely on redness and swelling is probably impossible in any event.

ALLEGED CORROBORATION BY JEANNIE WRIGHT DOES NOT JUSTIFY ADMISSION OF THESE STATEMENTS WITHOUT CONFRONTATION

Jeannie Wright testified she had seen the Defendants sexually abusing Kathy. This also must fail as substantial corroboration of Kathy's declarations. It should not be presumed to be accurate. Jeannie's testimony is fraught with all the dangers inherent in children's testimony.

Jeannie made no statements until she had been in her father's custody for one month. Her father and his girlfriend, Ms. Goodman, are not trained, objective professionals. On the contrary, Louis Wright is a convicted felon with the strongest possible motives to program Jeannie by suggesting stories to her which implicated her mother. He took Jeannie by force in the midst of a long-standing, bitter disagreement with Ms. Wright about custody. (Tr. Vol. III, p. 530, Ls. 2-18). He had been served with divorce papers seeking custody and appointment of an independent expert to study the best interests of the child. This service took place weeks before the first alleged disclosure. (Tr. Vol. III, p. 613, Ls. 4-7, pp. 615-617). He had vowed "to get even" with the Defendants "one way or another." (Tr. Vol. III, p. 652, Ls. 8-20). It is very easy for a well-meaning professional to shape a child's memory by *accident*. It would be a very easy matter for a highly-motivated parent to manipulate a child's memory intentionally.

That intentional manipulation occurred is suggested not only by the sworn denials of the Defendants, but also by the disinterested testimony of Ann Tweedy, Jeannie's teacher before Louis took Jeannie away. Ms. Tweedy saw none of the behavioral symptoms of child abuse or other trauma during the time Jeannie was with Ms. Wright. Instead, she saw a well-adjusted child with positive bond-

ing to her mother. (Tr. Vol. III, pp. 553-67). This testimony was corroborated by the neighbors. (*E.g.* Linda Hamby, Tr. Vol III, pp. 572-602).

This behavior is in sharp contrast to how Jeannie behaved *after* Louis took her from Ms. Wright. The testimony of counselor Carol Sorini described a very disturbed Jeannie Wright. (Tr. Vol II, pp. 254-330).

Detective Larry Armstrong testified that allegations which arise in the midst of a custody dispute are inherently suspect. (Tr. Vol. II, pp. 254-330).

Any suggestion and confabulation which occurred in Louis Wright's home during the month prior to the first alleged disclosure was compounded in later interviews. Repetition alone, even with careful, trained interviewers, will entrench a fantasy and make it indistinguishable from memories of real events. Goodman & Hegelson, *supra*, at 187. Detective Armstrong testified he interviewed Jeannie only briefly on the weekend these charges surfaced, because "[s]he had already been interviewed 3 or 4 times that weekend." (Tr. Vol. II, p. 333, Ls. 10-11). Dr. Jambura testified "When I had gotten Jeannie, two physicians had already interviewed her and she was not in the most communicative state." (Tr. Vol. II, p. 393, Ls. 18-20). There is no evidence that *any* of these prior interviews was conducted by a person or persons trained in proper interviewing techniques to avoid suggestion.

By the time she testified at trial, Jeannie had obviously been rehearsed at home. State's Exhibit #9 is a tape recording of Jeannie made by Cynthia Goodman two days before the preliminary hearing. (Tr. Vol. III, p. 467, L. 10 to p. 468, L. 7). In that recording, Jeannie sounds extremely well rehearsed compared to her trial testi-

mony. She repeated the version to her counselor, Carol Sorini, innumerable times before trial.

SUMMARY AND CONCLUSION

The Idaho Supreme Court noted several circumstances surrounding the elicitation of Kathy Wright's statements, each of which has been recognized as dangerous to the search for truth by the overwhelming majority of courts and commentators. The court below did not, contrary to the assertions of the Idaho Attorney General, hold that any of those factors, by itself, automatically disqualifies a statement from admissibility when confrontation is impossible. Rather, the court below considered these factors and the interrelationships among them and concluded that the prosecution had failed to establish sufficient reliability of Kathy Wright's statements to justify the conclusion that Ms. Wright's confrontation rights were not violated by admission of the statements.

The factors are: 1) the incompetence of the declarant and the marked confusion she demonstrated in response to simple questions, 2) the use of blatantly leading questions by the examiner who was investigating sexual abuse, 3) the preconceptions held by the interrogator, and 4) the absence of any recording of the interview session.

Ms. Wright respectfully submits that each of these factors was properly considered by the court below. Ms. Wright requests the Court to affirm the Supreme Court of Idaho.

Respectfully submitted,

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